Nos. 77-1540 and 77-1690

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BUSINESS MACHINES CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN TELEPHONE & TELEGRAPH CO., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General,

BARRY GROSSMAN,
CATHERINE G. O'SULLIVAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. BRUCE,
General Counsel,

DAVID J. SAYLOR,
Deputy General Counsel

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOHN E. INGLE,
Counsel,
Federal Communications Commission,
Washington, D.C. 20544.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 572 F. 2d 17. The opinions of the Federal Communications Commission are reported at 60 FCC 2d 261 (Pet. App. 1b-156b) and 62 FCC 2d 765 (Pet. App. 1c-30c).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1978. International Business Machines Corp. (IBM) filed the petition in No. 77-1540 on April 26, 1978. American Telephone & Telegraph Co. (AT&T) filed the conditional cross-petition in No. 77-1690 on May 26, 1978, having obtained an extension of time from Mr. Justice Marshall. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petition in No. 77-1540 presents these questions:

1. Whether the Commission has discretion to forbear altogether from regulating communications resellers.

2. Whether resellers are common carriers within the meaning of the Communications Act.

The conditional cross-petition in No. 77-1540 presents this question:

Whether the Commission followed appropriate procedures and made adequate findings in adopting its "resale and shared use" policy, applicable prospectively to the entire industry and implemented by prescription of tariff regulation.

STATEMENT OF THE CASE

Telephone and telegraph companies for many years have restricted or prohibited most of their customers from reselling and sharing communications services and facilities.[1] On the basis of (1) a complaint by an

[1] The FCC defines resale as an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers "communications services and facilities to the public (with or without 'adding value') for profit" (Pet. App. 5b). It defines sharing as "a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying * * * according to its pro rata usage * * *" (Pet. App. 5b).

organization whose members had been forbidden to share services,[2] and (2) petitions for rulemaking by two carriers[3] who wanted to buy telephone company services for resale, the Commission in July 1974 issued a notice of inquiry and proposed rulemaking to consider

> whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use.[4]

The notice made clear that the Commission intended to resolve important industry-wide policy questions through rulemaking.[5]

After receiving substantial comments from interested parties, the Commission terminated the proceeding in July 1976 with the order that is the subject of these review proceedings (Pet. App. 1b-156b). In pertinent summary, the Commission determined:

1. That AT&T's restrictions on resale and shared use of private line services were unjust and unreasonable in violation of Section 201(a) and (b) of the Communications Act of 1934, 48 Stat. 1070, as amended, and unduly discriminatory in violation of Section 202(a);[6]

[2] *American Trucking Ass'n, Inc.* v. *American Telephone & Telegraph Co.*, 41 FCC 2d 2.

[3] Microwave Communications, Inc., and Western Union Telegraph Co.

[4] *American Trucking Association, Inc.* v. *American Telephone & Telegraph Co.*, 47 FCC 2d 644.

[5] *Id.* at 645-646. See, also, Pet. App. 118b-131b, 2c-10c.

[6] Pet. App. 28b-76b).

2. That tariff regulations permitting unlimited resale and sharing of private line services[7] would be just and reasonable because they would produce specific enumerated public benefits;[8]

3. That resellers are communications common carriers subject to regulation under Title II of the Act;[9]

4. That customers sharing service are not engaged in common carriage and are not subject to regulation under Title II.

In the exercise of its discretion, the Commission adopted an "open entry" policy to govern its certification of resellers, indicated that it would maintain flexibility in regulating rates to encourage innovation and competitive charges, and stated that it would not bar exit by resale carriers unless it would result in actual impairment or discontinuance of service.[10] With regard to future regulation of resellers, the Commission stated:

> Later experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly.[11]

The Commission also reserved its discretion to consider what form of regulation of sharing arrangements might serve the public interest in the future.[12]

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[7]The order did not reach the restrictions on resale and/or sharing of ordinary long distance message telephone service (MTS) and wide area telecommunications service (WATS) (Pet. App. 52b-55b).

[8]Pet. App. 68b-76b.

[9]Pet. App. 77b-87b.

[10]Pet. App. 87b-101b.

[11]Pet. App. 87b.

[12]Pet. App. 101b-110b.

On multiple petitions for review, the court of appeals affirmed the Commission's decision "in all respects" (Pet. App. 1a-21a).

ARGUMENT

1. The petition in No. 77-1540 first assumes that resellers of telecommunications services are subject to regulation by the Federal Communications Commission as common carriers, but argues that the Commission nevertheless may forbear regulating them. In our view, that issue is not ripe for review in this Court.

To be sure, the court of appeals has stated its views on the question (Pet. App. 18a-19a). It is true, moreover, that Commission counsel, in defending the agency ruling, contended that the Commission had no discretion to forbear regulating a common carrier. But those circumstances do not bind this Court. What is critical is whether the Commission's order itself rests on the understanding that it enjoyed no discretion to forbear regulating resellers once it had determined that they were common carriers. If not, the issue is not properly here: "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297.

We submit that the Commission's order should be read as leaving the issue unresolved. On the whole, it is clear the Commission made a policy judgment that regulation of resellers was in the public interest.[13] Thus, in the major

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[13]To be sure, there are passages that may appear to look the other way. Thus, the Commission twice (Pet. App. 95b, 14c) used the imperative "must" in referring to regulation of resellers; and another passage, citing *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, suggests that the Commission cannot rely entirely upon a presumption that market forces will ensure that rates are "just and reasonable" (Pet. App. 97b). But at least the first two of these statements appear to reflect a policy imperative rather than a statutory one. The Commission appears to be saying

conclusory paragraph of the opinion and order on reconsideration, the Commission stated (Pet. App. 29c): "[W]e conclude that [the] *public interest* is served by our adoption of a *policy* requiring * * * the regulation of resellers (but not sharers) under Title II of the Act" (emphasis added). And, significantly, in its original order, after concluding that resellers were amenable to regulation as common carriers, the Commission expressly stated (Pet. App. 87b): "Later experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly." These statements, it seems to us, leave the door open.[14]

We do not suggest that the Commission has determined that it has discretion to withhold all regulation of resellers. But it is equally impossible, in the face of the statements just quoted, to argue that the agency has committed itself to the view that it *must* regulate resellers. Giving these passages their most natural reading, we believe the Commission, with deliberate caution, has not yet resolved for itself whether the Communications Act would permit nonregulation. If that is right, it must follow that the present ruling, imposing some regulation, represents a policy judgment, not a result dictated by a

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that it "must" regulate rates, entry and exit because the public interest requires that it do so. The regulatory scheme it adopted, after all, is not simply a rigid restatement of Title II. The Commission consciously tailored a regulatory scheme to the resale market (Pet. App. 87b-101b).

[14]See also the separate Statement of Commissioner Glen O. Robinson, concurring in part and dissenting in part, which appears to presuppose that the Commission had made a *policy choice* to regulate resellers—not that the Commission had felt *compelled* to regulate them (Pet. App. 151-156b).

supposed compulsion. And, indeed, the two orders reflect a weighing of considerations that would be superfluous if the Commission's hands were tied (Pet. App. 87b-101b).

At all events, the Commission's decisions ought not be read to resolve any point not necessary to the result. If two constructions of the orders are permissible, the narrower reading ought to be preferred. See *Federal Communications Commission* v. *Pacifica Foundation*, No. 77-528, decided July 3, 1978, slip op. 6. And, of course, this Court does not sit to review a policy judgment committed to agency discretion.[15] See, *e.g.*, *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471, decided June 12, 1978.

We conclude that the Commission has not resolved the issue sought to be presented and that the view taken by the court of appeals is no more than dictum, not binding on the Commission or any other party. In those circumstances, it would seem inappropriate for this Court to decide the question at this time. For the same reasons, we here express no concluded view on the issue.[16]

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[15]The petition in No. 77-1540 does not suggest that this Court ought to review the "substantive policy decision reached by the Commission" (IBM Pet. 11). On the contrary, petitioner asks only that the case be remanded to the Commission so that it can make "that policy decision" unembarrassed by the misapprehension that it had no discretion to forbear regulation (*ibid.*). Such a remand would of course be pointless if, as we submit, the Commission's decision was reached as a matter of policy. In due course, application can be made directly to the Commission to reconsider its policy judgment. Should the agency then indicate a view that its hands are tied by the Communications Act, it will be time enough to test the question in the courts.

[16]We note also that pending legislation may moot the issue. See H.R. 13015, 95th Cong., 2d Sess. (1978). Section 311(a) of that bill would expressly authorize the regulatory agency to exempt any class of carriers from any substantive regulatory provision in the common carrier title.

2. Petitioner in No. 77-1540 also challenges the basic ruling that a reseller of telecommunications services is a common carrier subject to regulation by the Commission. This was of course the necessary premise of the policy decision to regulate resellers pursuant to Title II of the Communications Act. In our submission, however, this question does not call for the Court's intervention.

We note first that the argument advanced here (Pet. 13-16) and in the court below that resellers are not common carriers because they are not themselves engaged in the "transmission" of communications was not presented to the Commission nor decided by it. Accordingly, Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, which codifies the judicial doctrine requiring exhaustion of administrative remedies, barred consideration of that issue in the judicial review proceeding. Although Commission counsel properly objected to the introduction of the new point, the court of appeals addressed it (see Pet. App. 16a-18a). This Court, however, is not bound to do so. Cf. *McGee* v. *United States*, 402 U.S. 480; *McKart* v. *United States*, 395 U.S. 185. The "transmission" argument ought not be considered here in a case which does not include the Commission's views on the matter.

At all events we submit that the Commission's conclusion that resellers of telecommunications services are amenable to regulation as common carriers is plainly correct, both for the reasons sufficiently articulated by the agency (Pet. App. 77b-87b) and for those given by the court of appeals (Pet. App. 15a-18a). Even if it be deemed a closer question than we believe it is, the matter is one that ought to be left to agency resolution. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

3. The conditional cross-petition in No. 77-1690[17] argues almost perfunctorily that the Commission failed to follow the requisite procedures in adopting the resale policy and thus failed to evaluate meaningfully the factors on which its decision is based. We submit that neither point warrants review in this Court even if IBM's petition were granted.

The court of appeals correctly found that the "notice and comment" procedures were both legally adequate and functionally appropriate to the task of establishing new industry-wide policy (Pet. App. 9a-12a). See *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224. Agency discretion as to how to proceed in making new rules was underscored in the Court's recent decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Def. Council, Inc.*, No. 76-419, decided April 3, 1978. This case plainly does not raise the "extremely rare" circumstances that would justify reversal of the agency for failure to employ "procedures beyond these required by the statute." Slip op. 2.

Moreover, the Commission's procedures produced a record which, considered in the light of the agency's familiarity with the industry, fully justifies its policies. The court of appeals described the Commission's rationale in some detail (Pet. App. 13a-15a), and found that it satisfied the requirements of reasoned consideration and substantial evidence. We adopt that court's language

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[17] AT&T makes clear that its own petition should be denied if the Court denies the IBM petition (AT&T Pet. 11).

rejecting AT&T's argument that the Commission was required to conduct an exhaustive economic impact study before taking action with regard to resale (Pet. App. 15a):

> The FCC may institute broad policy changes while leaving for future proceedings the fine tuning of the rate structure required to adjust for the economic impact of those changes.

CONCLUSION

For the reasons stated, the petition in No. 77-1540 and the cross-petition in No. 77-1690 should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

BARRY GROSSMAN,
CATHERINE G. O'SULLIVAN,
Attorneys.

ROBERT R. BRUCE,
General Counsel,

DAVID J. SAYLOR,
Deputy General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JOHN E. INGLE,
Counsel,
Federal Communications Commission.

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